IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ADMIRALTY SUIT NO.3 OF 1994

Kotak Mahindra Bank Ltd.
a Banking Company within the
meaning of Banking Regulation Act,1949
(10 of 1949) and registered under the
Companies Act,1956 having its registered
office at 36-38A, Nariman Bhavan, 227,
Nariman Point, Mumbaui-400021.

....Plaintiffs.

Vs.

1. M.F.V. "Shilpa" an Indian
   Vessel, registered at the
   Port of Visakapatnam having
   official No.VSP 101.

2. M.F.V. "Swetha" an Indian
   Vessel, registered at the
   Port of Visakapatnam having
   official No.VSP 102.

3. Surya Sea Foods Privat Limited,
   a Comopany incorporated under the
   Companies Act, 1956 and having its
   Registered Office at 201, Ganga Estate,
   6/3/350, Road No.1 Banjara Hills,
   Hyderabad-500034, Andhara Pradesh.

4. Shri. Kishore Kumar,
   Indian Inhabitant, residing at
   PJ-62 Officers Colony,
   Punjgrutta Hyderabad, Andhara Pradesh.

5. Shri. Vasant Kumar,
   Indian Inhabitant, residing at
   10-2-317/19, Vijay Nagar Colony,
   Hyderabad-500457, Andhara Pradesh.

6. Shri. B. Dayakar Rao,
   Indian Inhabitant, residing at
   2-4-37 Ramnagar,
   Opp. Head Post Office, Hanumakonda,
   Dist. Warangal 506 001, Andhara Pradesh.

7. Shri.Tirupathi Reddy,
   Indian Inhabitant, residing at
   Village Rajapur, Dist. Karimnagar, (A.P.).

..Defendants.

Mr. Birendra Saraf, Mr.Ashish Kamath and Mr. Nikhil Rajani i/by V.Deshpande &Co. for the Plaintiffs.

CORAM : A.M. KHANWILKAR, J.
DATED : 1ST OCTOBER, 2007.

ORAL JUDGMENT :

1. This suit was originally filed by SCICI Limited. In view of the Scheme of Amalgamation sanctioned by this court under order dated 3.4.1997, the present suit has been allowed to be continued by the Industrial Credit and Investment Corporation of India Limited.

2. According to the plaintiffs the defendant No.3 Company proposed to acquire two new 27- metres. vessels with a fishhold capacity of about 122- Cubit metres. (approximately 55 tonnes) each and one new indigenous 24 metres. vessel with a fishhold capacity of about 90 Cubit meters (approximately 40 tonnes) fishhold capacity for pursuing its object of deep sea fishing. The cost of the project was estimated at Rs.335/- lacs. The Rupee Term Loan of Rs.76/- lacs, ii) Foreign Currency Loan of US $ 661,600 (approximately equivalent to 86 lacs at the rate of exchange) prevailing at the relevant time. The plaintiffs sanctioned the said Rupee Term

Loan of Rs.67/- lacs as also Foreign Currency Loan of US $ 661, 600. In that context, two separate agreements titled as Rupee Loan Agreement and Foreign Currency Loan Agreement were executed on 12.3.1988. The plaintiffs agreed to lend and the defendant No.3 agreed to borrow the amount referred to above on the terms and conditions set out in the said agreements. Pursuant to the obligation contained in the aforesaid agreements the defendant Nos. 4 to 7 executed a Deed of Joint/Several/Personal Guarantee dated 12.4.1988. By the said Guarantee the defendant Nos. 4 to 7 jointly and severally, irrevocably and unconditionally guarantee to repayment of the instalments of the first Rupee Loan of Rs.67/- lacs and Foreign Currency Loan of US $ 661,600 and other monies due and payable by the defendant No.3 to the plaintiff under the said agreements. According to the plaintiffs, pursuant to the aforesaid two agreements, the defendant No.3 represented to the plaintiffs that Foreign Currency Loan approximately to Rs.86/- lacs agreed to be lend by Bank of India as per the original official plan of the project was to be delayed. For that reason, the defendant No.3 requested the plaintiffs to provide an additional Rupee Loan of Rs.87/- lacs in view of the Foreign Currency Loan from Bank of India. On that representation, the plaintiffs sanctioned a further Rupee Loan of Rs.87/- lacs to the defendant No.3. The

defendant No.3 executed a Second Loan Agreement dated 6.5.1988 and agreed to borrow further amount of Rs.87/- lacs on the terms and conditions set out in the said agreement. The said document is titled as second Rupee Loan Agreement. In addition to second Rupee Loan agreement, the defendant Nos. 4 to 7 executed Joint/Several/Personal guarantee on 6.5.1988 agreeing to repay the loan amount payable by the defendant No.3 and other payments under the second Rupee Loan Agreement dated 6.5.1988. It is the case of the plaintiff that on the basis of the aforesaid agreements the defendant No.3 availed of loan amounts. However, the defendants purchased only two fishing vessels namely "M.F.V. Shilpa" and "M.F.V.Swetha". In respect of the said vessels statutory mortgage deeds were executed on 11.5.1989 which were duly registered on 17.5.1989 with the Registrar of India Ships, Vishakhapattan in terms of the provisions of the Merchant Shipping Act 1958. According to the plaintiffs, in or about September, 1989, the defendant No.3 represented to the plaintiffs that it was interested in implementing the project by acquiring two imported trawlers only as against the original proposal of acquiring two imported trawlers and one indigenous trawler. The plaintiffs accepted the revised proposal of the defendant No.3 and the project costs was accordingly modified and the defendant No.3 was allowed to utilise Rs.35/- lacs out of the first

Rupee Loan of Rs.67/- lacs sanctioned for acquisition of two imported trawlers for meeting part of the increased cost of the acquisition of two imported trawlers. To record this position, a supplementary loan agreement was executed on 18.9.1989 which substituted Clause -2(i) of Article-II and Schedule IV respectively of the first loan agreement by Annexure-C & D respectively of the supplementary loan agreement, thereby the defendant No.3 agreed to borrow to the maximum extent of 35 lacs and the repayment of that amount in accordance with Annexure D to the supplementary loan agreements. Besides, in September, 1989 the defendant No.3 requested the plaintiffs to convert the amount of Foreign Currency Loan amounting to US $ 661, 600 to 384,005.57 U.K. Pound Sterling. Even this request of the defendant No.3 was accepted by the plaintiffs. That position is recorded in the Note of Amendment dated 18.9.1989. It is the case of the plaintiffs that in terms of the aforesaid agreement, the plaintiffs disbursed and advanced amounts aggregating to Rs.122/- lacs under the first and second Rupee Loan Agreements and Rs.86/- lacs (being the amount approximately equivalent to 384,005.57 U.K. Pound Sterling) to the defendant No.3. The defendant No.2 was bound to repay the said amount alongwith agreed rate of interest as recorded in the respective agreements. The defendant No.3 however, defaulted in repaying the amount. As a result, the

plaintiffs addressed notice dated 1.4.1993 individually to the defendant Nos. 4 to 7 enclosing the statements of outstanding dues in respect of Rupee Loan Agreement as on 27.1.1993 and Foreign Currency Loan as on 1.4.1993. The said defendants were called upon to pay sum of Rs.1,24,74,554/- alongwith interest being the aggregate outstanding amount of the Rupee Loan and Foreign Currency Loan payable by the defendant No.3. The plaintiffs then addressed another notice dated 28.4.1993 to the defendant No.3 and the defendant No.s 4 to 7 placing on record whole of the principal amount of the Rupee Loan and the Foreign Currency Loan and all accrued interest thereon with all charges due there under that became due and payable and called upon the defendant No.3 and defendant Nos. 4 to 7 to jointly and severally pay such amounts within 15 days from the date of issue of the notice failing which the plaintiffs would initiate appropriate legal action against them. In response to the legal notice the defendant No.3 wrote back to the plaintiffs on 5.5.1983 explaining the circumstances for its poor performance. The reply concedes the position that the loan amounts have been availed by the defendant No.3 and that they were liable to pay sum alongwith interest and charges, but requested for time to enable them to clear all over dues as soon as possible. The plaintiffs however, not convinced have instituted the present suit for recovery of sum of

Rs.4,16,15,421/- plus interest thereon payable by the defendant No.3 as the borrower and defendant Nos. 4 to 7 as guarantors. The said defendants are jointly and severally liable to pay the said amount to the plaintiffs on as on 31.7.1993. The present suit has been filed on 1.10.1993 for the following reliefs.

> "a. that the Defendant No.1 and 2 vessels together with their hulls, masts, boats, anchors, cables, engine and deck machinery, gears, chairs, rigging, tackle, apparel, furniture and all others appurtenances thereto be arrested by and under the warrant of arrest issued by this Hon'ble Court.
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> b. that it be declared that there is due and payable by the Defendant No.3, to the plaintiffs a sum of Rs.4,16,15,421/- as per the particulars of claim being Exhibit-S hereto and the defendant No.3 be ordered and decreed to pay the same with interest at the rate of 18% p.a. with costs, charges, expenses, to the plaintiffs from 16th July 1993 for the Rupee loans and 1st August 1993 for the Foreign Currency loan until payment in full.
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> c. that it be declared that there is due and

payable by the Defendant Nos. 4 to 7 jointly/severally to the plaintiffs a sum of Rs.4,16,15,421/- as per the particulars of claim being Exhibit S hereto and the Defendant Nos. 4 to 7 jointly/severally be ordered and decreed to pay the same with interest at the rate of 18% p.a. with costs, charges, expenses, to the plaintiffs from 16th July 1993 for the Rupee loan and 1st August 1993 for the Foreign Currency loan until payment in full.

d. that it be declared that the Defendant No.1 and 2 Vessels are validly charged/mortgaged by way of statutory mortgage in favour of the plaintiff for due repayment of the amounts mentioned in prayer(b) and (c).

e. that it be declared that the whole of the movable properties of Defendant No.3 short particulars of which are given in Schedule-II to the unattested deed of hypothecation being Exhibit "F" hereto are validly charged/mortgaged by Defendant No.3 in favour of the plaintiffs.

f. that the Hon’ble Court be pleased to order and decree that the Defendant No.1 and 2 vessels be detained, condemned and sold for the

discharge of dues mentioned in prayer (b) and (c) above together with interest at the rate of 18% until payment in full and in the event of any deficiency, the balance along with interest at the rate of 18% p.a. be ordered and decreed to be paid by the Defendant No.3 and by Defendant Nos. 4 to 7 jointly/severally.

g. That pending the hearing and final disposal of the suit Defendant No.1 vessel and Defendant No.2 vessel together with its plant, engine, machinery, gear, tackle and other paraphernalia be arrested and ordered to be sold by an order of this Hon'ble Court and the sale proceeds thereof be deposited with any Scheduled Commercial Bank/Nationalised Bank in an interest bearing Account as a security towards the satisfaction of the Plaintiff's claim in the suit.

h. that the Hon'ble Court be pleased to order and decree that the whole of the movable properties of Defendant No.3, short particulars of which are given in Schedule II to the unattested Deed of Hypothecation being Exhibit "F" hereto be attached and sold by and under the directions of this Hob'ble Court either through

the Commissioner for Taking Accounts High Court, Bombay or by the Court Receiver by public auction or by private sale treaty by and under Decree and direction of this Hon'ble Court and the Net Sale proceeds thereof be appropriated in or towards the plaintiffs claim mentioned in prayers (b)and (c) hereto.

i. For the costs of the suit; and

j. For such further and other reliefs as the nature and circumstances of the case may require."

3. The defendants have filed joint written statement. The stand taken on behalf of the defendants is of general denial. The defendants however, raised the issue regarding the jurisdiction of this court. On the basis of the pleadings this court settled and framed in all twelve issues on 8.6.2006, which read thus.

1. Does the plaintiff prove that defendant No.3 as the borrower and defendant Nos. 4 to 7 as Guarantors are jointly and severally liable to pay to the plaintiffs an amount of

Rs.4,16,15,421/- with further interest @ 18% p.a. on Rs.4,16,15,421/- from the date of filing of the suit till payment or realization?

2. Does the plaintiff prove that M.F.V.Shilpa and M.F.V.Shvetha being defendant Nos. 1 and 2 vessels are validly mortgaged by way of Statutory mortgage in favour of the plaintiffs for due repayment of Rs.4,16,15,421/- with further interest @ 18% p.a. on 4,16,15,421/- from the date of filing of the suit till payment or realization?

3. Does the plaintiff prove that M.F.V. Shilpa and M.F.V. Shvetha being defendant Nos. 1 and 2 are liable to be detained, condemned and sold for the discharge of Rs.4,16,15,421/- with further interest on 4,16,15,421/- from the date of filing of the suit till payment or realization?

4. Does the plaintiff prove that the whole of the movable plant and machinery and spares, tools and accessories and other movables, short particulars of which are given in Schedule II of unattested Deed of Hypothecation dated 2nd May 1989 being Exhibit "F" to the plaint are validly

charged hypothecated by defendant No.3 in favour of the plaintiffs for due repayment of Rs.4,16,125,421/- with further interest @ 18% p.a. on Rs.4,16,15,421/- from the date of filing of the suit till payment or realization?

5. Does the plaintiff prove that the whole of the movable properties of defendant No.3 comprised of movable plant and machinery and machinery and spares, tools and accessories and other movables short particulars of which are given in Schedle-II of Unattested Deed of Hypothecation dated 2nd May, 1989 being Exhibit "F" to the plaint are liable to be sold and the net sale proceeds thereof plaintiffs claim of Rs.4,16,15,421/- from the date of filing of the suit till payment or realization?

6. Whether this court has jurisdiction to decide the above matter?

7. Whether this court can entertain the above suit in view of the fact that all the defendants including the vessels are from the State of Andhra Pradesh which is outside the territorial jurisdiction of this Court?

8. Whether this Court can entertain the above suit when the charge of mortgaged property is registered in the State of Andhra Pradesh?

9. Whether this Court has jurisdiction to entertain the above in view of the fact that the vessel itself is registered in the State of Andhara Pradesh?

10. Whether this Court can entertain the above suit in view of the establishment of tribunals under Recovery of Debts due to Banks and Financial Institutions Act (51 of 1993)?

11. Whether the plaintiff can prove the claim incorporated in the plaint?

12. What order and decree?

4. As the Issue Nos. 6 to 10 pertain to jurisdiction of this court, the same have been decided as preliminary issues and answered in the affirmative by speaking order dated 3.5.2001. In the circumstances, it is not necessary to address the said Issue Nos. 6 to 10 in the present Judgment.

5. It is relevant to note that after issues on the

question of jurisdiction of the court has been answered against the defendants, the defendants have not appeared before the court nor adduced any evidence. The plaintiff on the other hand filed affidavit of evidence in lieu of examination-in-chief of Tushar Patel sworn on 23.7.2007. The plaintiffs in addition filed further affidavit of Tushar Patel for allowing to lead additional examination in chief sworn on 9.8.2007. The witness made himself available before the court for being cross examined. However, as no appearance was made by the defendants, the evidence was treated as closed. In the said affidavit, the witness of the plaintiffs' has reiterated the case made out in the plaint. Besides, the oral evidence the plaintiffs are relying on the documentary evidence. The compilation of original documents has been filed on 23.7.2007. The plaintiffs have also filed additional compilation of original documents on 9.8.2007. The documents so produced have been proved by the plaintiffs in the examination-in-chief of Shri. Tushar Patel.

REASONS

ISSUE NO.1 & 11 :

6. According to the plaintiffs they have extended financial facilities to the defendant No.3. For that

purpose Rupee Loan Agreement dated 12.3.1988 and Foreign Currency Agreement dated 12.4.1988 and second Rupee Loan Agreement dated 6.5.198 were executed. As per the first Rupee Loan Agreement, the plaintiffs were to be granted loan upto Rs.67/- lacs. The said agreement records that the borrower shall pay to the plaintiffs interest on the principal amount of loan outstanding from time to time quarterly in each year 15th day of January, April, July and October at the rate set out in Schedule III to the agreement and Clause 2.2 of the agreement pertains to interest payable by the defendant No.3. Clause-2.2(ii) provides for additional interest to be charged and payable by the defendant No.3. Clause-2.3 refers to management fee to be charged by the plaintiffs in lumpsum being 0.5% on the principal amount. Clause -2.5 deals with the commitment charges at the rate of 1% payable quarterly on the principal amount. Clause-2.7 provides for repayment of the loan amount by the defendant No.3 in accordance with the amortisation schedule set forth in Schedule IV to the agreement. The Foreign Currency Loan Agreement envisages the loan facility to be extended to the defendant No.3 upto IS $ 661,600 (equivalent to Rs.86/- lacs at the current rates of exchange). The terms and conditions are similar to Rupee Loan Agreement. Even this agreement provides for similar terms and conditions as in the case of Rupee Loan Agreement. The second Rupee Loan Agreement dated

6.5.1988 where under the loan facility is granted to the defendant No.3 upto Rs.87/- lacs also provides for similar terms and conditions. Besides the loan agreements, the defendant Nos. 4 to 7 have stood guarantors by giving personal guarantee signed on 12.4.1988 and 6.5.1988. They have agreed to repay the principal loan amount as well as interest and the charges thereon payable by the defendant No.3 in case of default by defendant No.3. As per the personal guarantee the defendant Nos. 4 to 7 have jointly and severally agreed to repay such outstanding amount payable by the defendant No.3. The fact that the defendant No.3 availed of Rupee Loan is not in dispute at all. The plaintiffs had in their legal notice sent to the defendant Nos. 3 to 7 while calling upon the respective defendants to pay the amount specified in the notice provided the break up of the amount by sending statement of respective loan account. The loan account refers to amount payable towards the penal interest, interest on Rupee Tide Loan, Commitment charges etc. The interest amount has been calculated on the basis of the terms and conditions of the respective agreement. The defendant No.3 alone has responded to the legal notice. In the reply sent by the defendant No.3 being letter dated 5.5.1983, the defendnat No.3 nowhere disputes the correctness of the figure so disclosed by the plaintiffs in the legal notice. On the other hand,

the defendant No.3 has admitted its liability to pay that amount but goes on to explain the circumstances in which it was not in a position to repay the amount. The defendant No.3 in fact requested the plaintiffs to grant some time so that the outstanding dues can be cleared. In other words, the amount demanded by the plaintiffs outstanding as on 27.1.1993 has not been disputed by the said defendant at all. The question is Whether the defendant Nos. 4 to 7 are jointly and severally liable to pay the outstanding amount payable by the defendant No.3. This question need not detain the court, as that the liability of the defendant Nos. 4 to 7 arises on account of joint personal guarantee given by the said defendants on 12.4.1988 and 6.5.1988. The defendant Nos. 4 to 7 have stood guarantors for repayment of the loan amount payable by the defendant No.3-Company. The guarantee given by them is a continuing guarantee. The plaintiffs therefore, called upon even the said defendants to repay the outstanding loan amount. In my opinion, the defendant Nos. 4 to 7 are jointly and severally liable to pay the loan amount alongwith the defendant No.3 to the plaintiffs as referred to in the legal notice which is the foundation for institution of the present suit. The principal amount under the Rupee Loan Agreement dated 12.3.1988 and Rupee Loan Agreement dated 6.5.1988 on the date of institution of the suit is stated to be 1,60,081.00 and the interest and other

charges payable on the said amount as on 15.7.1993 is stated to be Rs.1,04,96,374/-. In so far as amount in respect of Foreign Currency Loan is concerned, in terms of agreement dated 12.4.1988 on the date of institution of the suit is Rs.1,46,849.00 and interest and other charges accrued thereof as on 31.7.1993 is stated to be Rs.1,99,209.00. The interest has been computed by the plaintiffs as per the terms and conditions of the respective agreement. In addition, the plaintiffs are entitled to receive principal instalment (Rupee Tide) in the sum of Rs.28,64,778.00 from the defendant No.3 aggregate amount recoverable by the plaintiffs from the defendant No.3 on the date of institution of the suit is Rs.4,16,15,421/-. It is relevant to record that even during the pendency of the suit attempt was made to offer one time settlement in respect of the entire suit claim amount. The defendant No.3 however, did not avail of the said opportunity. For that reason the plaintiffs withdrew the offer of one time settlement given to the defendants. In my opinion, therefore, the plaintiffs are entitled to recover suit claim amount of Rs.4,16,15,421/- from the defendant Nos. 3 to 7 jointly and severally. Besides the plaintiffs are entitled for further interest. The question is what should be further interest to be awarded to the plaintiffs. The plaintiffs have claimed 18% per annum as per their interest rate. The plaintiffs have asserted that the

defendants were liable to pay interest as per their contractual obligation recorded in the agreement itself. In any case, the transaction between the parties was in relation to commercial activities. That being the position, the plaintiffs have claimed further interest at the rate of 18% per annum on the suit claim amount. Accordingly, Issue Nos. 1 and 11 are answered in the affirmative.

ISSUE NOS. 2 AND 3 :

7. In so far as these two issues are concerned, the same do not survive for consideration inasmuch as the disputed vessels have already been sold out. Accordingly, I am not burdening this judgment by discussing said issues.

ISSUE NOS. 4 & 5 :

8. In so far as these issues are concerned, the plaintiffs are relying on the document i.e. Deed of Hypotehcation dated 2.5.1988.The same is executed between the plaintiffs and the Defendant No.3 in the context of Rupee and Foreign Currency Loan Agreements dated 12.4.1988 and 6.5.1988 and as amended from time to time. The recitals of these deeds mention that one of

the condition of the loan agreement is that the loan together with interest, liquidated damages, commitment charges, management fee. premia or redemption, costs, expenses and other monies whatsoever stipulated in the loan agreements shall be secured inter alia by first charge by way of hypothecation of all the borrowers, movable properties of the defendant No.3 both present and future subject to the prior charge created and/or to be created in favour of the borrower's bankers on the borrower's stock of raw materials, semi finished and finished goods, consumable stores and such other movables as may be agreed to for securing the borrowings for working capital requirements in the ordinary course of business. It is in this background the hypothecation deed has been executed between the parties which covers whole of the moveable plant and machinery, machinery spares, tools and accessories and other moveables, both present and future machinery, spare parts, tools etc. and other movable and immovable properties of the defendant No.3 as referred to in Schedule-II to the said deed. Schedule II to the said deed reads thus :

> "All other moveable properties of the Borrower including its moveable plant and machinery, machinery spares, tools and accessories and other moveables, both present and future, (save and except book debts) whether installed or not

and whether now lying loose or in cases or which are now lying or stored in or about or shall hereafter from time to time during the continuance of the security of these presents be brought into or upon or be stored or be in or about all the borrower premises situated at Hyderabad or whatever else the same may be or be held by any party to the order or disposition of the borrower or in the course of transit or on high seas or on order, or delivery, howsoever and wheresoever in the possession of the Borrower and either by way of substitution or addition".

8. The factum of existence of these document has not been disputed by the defendants at all. The defendants are also not disputing that such document has been executed or on behalf of the defendant No.3. The plea taken in the written statement however is of general denial and vague. Paragraph-15 of the Written Statement deals with this aspect. According to the defendants the unattested Deed of Hypothecation dated 2.5.1989 and the particulars of the movable property is not maintainable and the same is illegal. Paragraph-15 of the Written statement reads thus :

"With reference to Para 14 of the plaint, these

defendants submit that the unattested deed of hypothecation dated 2.5.1989 and the particulars of the moveable property is not maintainable and the same is illegal in terms of Contract Law and further the deed of hypothecation is already barred by Law of Limitation".

9. Suffice it to observe that, the plea taken on behalf of the defendants is not only vague and ambiguous but also without any substance. In my opinion, therefore, even Issue Nos. 4 and 5 will have to be answered in favour of the plaintiffs.

ISSUE NO.12 :

10. In so far as reliefs claimed in the suit are concerned, in the fact situation of the present case, the counsel for the plaintiffs has rightly confined to reliefs (b), (c), (e),and (h). The said reliefs are already reproduced. The prayer clauses in the plaint are already reproduced in extenso in the earlier part of the judgment. Accordingly, the plaintiffs having established the fact that the defendant Nos. 3 to 7 are jointly and severally liable to pay the suit claim amount together with future interest are entitled for reliefs in terms of (b), (c), (e) and (h).

. Accordingly, the suit is decreed as follows.

(a) The plaintiffs are entitled to decree in terms of prayer clause (b), (c), (e) and (h) with costs of the suit.

(b). Decree be drawn up accordingly.

(A.M. KHANWILAKR, J.)